DAVID J. FLAKER

IBLA 97-123 Decided January 8, 1999

Appeal of a decision by the California State Director, Bureau of Land Management, affirming a notice of noncompliance issued by the Area Manager, Ridgecrest Resource Area. CAMC 263009; CACA 37122.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Use and Occupancy

   Pursuant to 43 C.F.R. Subpart 3715, governing use and occupancy under the mining laws, one proposing a use that would involve occupancy, but is "casual use" under 43 C.F.R. § 3809.1-2, or does not require a plan of operations under 43 C.F.R. § 3809.1-4, is subject to the consultation provisions of Subpart 3715 and the occupant must submit the materials required by 43 C.F.R. § 3715.3-2 to BLM. Where consultation has not occurred under Subpart 3715, the Decision will be set aside and vacated, and the case remanded to allow adjudication under that subpart.

APPEARANCES: David J. Flaker, Lake Havasu City, Arizona, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

David J. Flaker has appealed from a November 18, 1996, Decision of the California State Director, Bureau of Land Management (BLM), affirming the Notice of Noncompliance issued by the Area Manager, Ridgecrest Resource Area, granting Flaker 30 days within which to file a mining plan of operations or a removal and reclamation plan and, additionally, to file a $2,000 reclamation bond with the Authorized Officer before proceeding with further mining operations or occupancy on his unpatented mining claim.

The Notice of Noncompliance arose within the following context. On December 3, 1994, a BLM inspector, R.A. Lewis, patrolled Flaker's claim, located in Bonanza Gulch, NE¼, sec. 3, T. 29 S., R. 38 E., Kern County, California. Lewis found that Flaker had made substantial improvements, including restoring a wall and adding a porch to a primitive cabin located on the claim, but Lewis observed very little evidence of mining activity

justifying Flaker's occupancy there. Lewis advised Flaker to discontinue construction until a meeting with BLM officials could be arranged regarding use of the structures. (Lewis Patrol Request dated Dec. 3, 1994.) About a year and a half later, on May 14, 1996, a BLM law enforcement ranger returned to the location and found that the site had been further improved by the addition of an air conditioning unit, a barbecue pit, a shower stall, and an antenna. Once again, the inspector found very little evidence of mining activity. This field check led the ranger to file an initial report of unauthorized use with the Ridgecrest Resource Area Office. A week later, BLM Supervisory Geologist Linn Gum met with Flaker, and thereafter filed a report documenting her understanding of Flaker's occupancy of the claim.

Gum's report states that Flaker's claim is located on Class L lands within the California Desert Conservation Area (CDCA), and, if Flaker intended to engage in more than casual use on the claim, he was required pursuant to 43 C.F.R. § 3809.1-4(b)(1) to file a mining plan of operations. Flaker used the cabin intermittently throughout the year, "staying for various periods from a weekend to as long as a week," allegedly to conduct mining pursuant to the mining law, and allowed other people on the site at various times to "caretake" the cabins. Flaker's mining operation was less than 1 acre in size and used pick, shovel, and "small motor driven dry washer technology." After observation of the site, Gum concluded that, more than likely, Flaker's operation did not qualify for residential occupancy on the claim.

Gum reported that she informed Flaker of this during their May 21, 1996, meeting, and told him that full time occupancy on mining claims is permitted only where the occupancy is reasonably incidental to the level of on-going mining or milling operations. She informed Flaker that he would have to justify his occupancy through showing that his mining activity warranted 24-hour residency. He could do this, Gum reported telling him, by filing a mining plan of operations with BLM, and a Surface Mining and Reclamation Act reclamation plan with Kern County, and by posting a cash reclamation bond set by the agencies. (Gum Memorandum to File dated June 10, 1996.)

Subsequent to his meeting with Gum, Flaker wrote the Area Manager a letter stating that it was his understanding that BLM officials intended to "burn down the cabin on the claim," and informing them that they did not have his consent to be on the claim or burn down the cabin. (Letter of David J. Flaker to Lee Delaney, Area Manager, dated June 2, 1996.)

It was within this context that the Area Manager issued the June 28, 1996, Notice of Noncompliance and Decision and Order pursuant to the authority granted by 43 C.F.R. § 3809.3-2. The Area Manager's Decision formally required Flaker to, within 30 days of receipt of the Notice, either file a mining plan of operations pursuant to 43 C.F.R. § 3809.1-5, or a removal and reclamation plan pursuant to 43 C.F.R. § 3809.1-3(d)(4), and to supply a reclamation bond in the amount of $2,000. The Decision notified Flaker that continued operations or occupancy prior to completion of these requirements would constitute grounds for BLM to seek a

court order enjoining his unlawful occupancy of public lands, and that denial of BLM access to the property for purposes of inspection would be in violation of 43 C.F.R. § 3809.3-6. (Notice of Noncompliance at 2.)

Flaker appealed this Decision to the State Director, and on November 18, 1996, the State Director affirmed the Area Manager's Notice of Noncompliance. 1/ It is the State Director's Decision that is now on appeal to the Board. The introductory remarks by the State Director to Flaker are instructive:

> The AM's [Area Manager's] notice of noncompliance is directed to your use of living quarters on the MF1 placer claim. He is concerned that you and your friends are using the public lands under the guise of the mining law for purposes not related to mining. To be reasonably incidental to mining, the miner must be engaged in substantially regular mining related work that is observable to the BLM inspectors. To better ascertain the need for living quarters on the public lands, the AM's notice of noncompliance informs you to complete the following activities within 30 days:
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> 1. File a mining plan of operations or a removal and reclamation plan.
>
> 2. Submit a reclamation bond for $2,000.
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> 3. Provide ready access to your unpatented placer mining claim to all BLM inspectors.

Citing 43 C.F.R. § 3809.1-4(b)(1) (requiring a plan of operations for all mining activity in limited use areas of the CDCA demonstrating more than casual use), 43 C.F.R. § 3809.3-6 (requiring operators to permit BLM officials access to their minesites to determine whether surface use requirements are being followed), and BLM Instruction Memorandum No. 90-582, Item No. 1, page 2, dated August 14, 1990 (establishing mandatory reclamation bonds for all plans of operations where operators are not able to demonstrate the existence of a State bond), the State Director informed Flaker that BLM retains the authority to require Flaker to perform the acts requested or to seek his removal from the claim after obtaining the appropriate court order. The State Director therefore concurred with the Area Manager's June 1996 Decision.

In his Statement of Reasons (SOR) on appeal to the Board, Flaker has raised three main concerns. First, he alleges that BLM has not given him

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1/ Flaker originally filed an appeal of that Decision with this Board, docketed as IBLA 97-19. That appeal was dismissed as premature by Order of the Board dated Nov. 25, 1996, because, at that time, the Board had not received notice either that Flaker had appealed the Area Manager Decision to the State Director, or that State Director review had been completed.

due credit for improving a preexisting abandoned site on public lands that was in disrepair prior to the start of his operation, and that he should not be required to tear it down because it improves the site and he has made an investment in it. Second, he claims that the cabin is necessary for his operation. Third, he claims that he does not understand why he has to file a plan of operations and post a bond if his use of the mining claim is "casual."

Where, as in the present case, a party appeals from a BLM determination affirming a notice of noncompliance under 43 C.F.R. § 3809.3-2, it is his obligation to show that the determination is incorrect. The burden of proof is on an appellant to show error in the decision appealed from; in the absence of such a showing, the decision will be affirmed. Fred Wilkinson d.b.a Miller Mining Creek Co., 135 IBLA 24, 25 (1996); B.K. Lowndes, 113 IBLA 321 (1990); Wells J. Horvereid, 88 IBLA 345 (1985). Where an SOR shows adequate basis for appeal, however, and appellant's allegations are supported with evidence showing error, the appeal will be afforded favorable consideration. See, e.g., Howard J. Hunt, 80 IBLA 396 (1984).

BLM's June 28, 1996, Notice stated Appellant was not in compliance with 43 C.F.R. § 3809.1-4(b)(1). That regulation requires that any operation, other than a casual use operation, located on lands in the CDCA designated as controlled or limited use areas by the CDCA plan must have an approved plan of operations on file with BLM prior to commencement of mining operations. The Notice stated in writing what BLM officials had conveyed to Flaker at their May 21, 1996, meeting: that BLM assessed Flaker's operations as "casual use," and, as such, they "were not of sufficient size, scope, or continuous operation to warrant full time occupancy of the public lands." (BLM Notice of Noncompliance at 1.) BLM informed Flaker that, under BLM policy as set forth in the BLM Manual at Section 3893, casual use operations do not justify residential occupancy of a mining claim, and that, under these circumstances, Flaker's residential occupancy constituted "undue degradation of the Federal lands." (Notice of Noncompliance at 2.)

The surface management regulations define many of the concepts important to BLM's decision. "Operations" means all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto, whether on a mining claim or not, including but not limited to the construction of roads across Federal lands. 43 C.F.R. § 3809.0-5(f). "Casual use" means "activities ordinarily resulting in only negligible disturbance of the Federal lands and resources." 43 C.F.R. § 3809.0-5(b). The following example is provided in that regulation: "[A]ctivities are generally considered casual use if they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in areas designated as closed to off-road vehicles * * *." "Unnecessary or undue degradation"

means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses. 43 C.F.R. § 3809.0-5(k). Finally, "reclamation" means taking such reasonable measures as will prevent unnecessary or undue degradation of Federal lands, including reshaping land, including complying with the level of reclamation required by statutes specifically involving the CDCA. 43 C.F.R. § 3809.0-5(j); 43 C.F.R. § 3809.0-5(k).

The Notice of Noncompliance is also informed by section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1994), and BLM policy established pursuant thereto. Section 4(a) bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing; however, a claimant may not occupy a claim for purposes other than mining activity. See United States v. Lee Jesse Peterson, 125 IBLA 72, 77-93 (1993).

Failure to file a plan of operations under section 3809.1-4 subjects the operator to a notice of noncompliance or injunction by court order. 43 C.F.R. § 3809.3-2. Failure to reclaim areas disturbed by operations (whether authorized or unauthorized) also subjects the operator to a notice of noncompliance. Id.

The record in this case, however, neither supports BLM's Notice of Noncompliance nor the State Director's November 18, 1996, Decision affirming it. BLM's November 18, 1996, Decision requires Flaker to file a mining plan of operations or a removal and reclamation plan. A mining plan of operations is required only if the activities on the claim rise above the level of "casual use."

That conclusion contradicts BLM's earlier statements. Flaker asserts: "I attempted to file a Plan of Operations, but was told this was not necessary." (Flaker Letter to BLM of Nov. 30, 1996.) That reflects that BLM did regard Appellant's efforts on the claim as mere "casual use." Information provided in Flaker's SOR further demonstrates BLM's determination: "My use was deemed 'casual' and my plan of operations was therefore rejected. I am now being told I must post a bond, but am also being told a bond is not necessary for 'casual' operations." (SOR at 2-3.) This is buttressed by BLM's March 21, 1997, letter to Flaker: "Your level of operations, casual use in scope and size, do[es] not warrant continued occupancy of the public lands."

Therefore, BLM's November 18, 1996, Decision is self-contradictory. If occupancy is "casual use," the regulations provide that no mining plan of operations is required. See 43 C.F.R. § 3809.1-4(b). The record

reflects that BLM is actually addressing an unauthorized occupancy. That is clear from BLM's letters to Flaker. See, e.g., BLM's March 21, 1997, Letter to Flaker. It is "officially" reflected in the November 18, 1996, Decision by giving Flaker the option of filing a removal and reclamation plan, which he would only do if he gave up his occupancy of the claim. BLM, however, did not follow its own regulations in attempting to end the unauthorized use.

[1] Pursuant to 43 C.F.R. Subpart 3715, governing use and occupancy under the mining laws, one proposing a use that would involve occupancy, but is "casual use" under 43 C.F.R. § 3809.1-2, or does not require a plan of operations under 43 C.F.R. § 3809.1-4, is subject to the consultation provisions of Subpart 3715 and the occupant must submit the materials required by 43 C.F.R. § 3715.3-2 to BLM. Where consultation has not been effected by BLM under this provision, and the occupant has not been given the opportunity to provide a submission in accordance with 43 C.F.R. § 3715.3-2, the decision will be vacated and the case remanded to allow adjudication under 43 C.F.R. Subpart 3715.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Manager's Notice of Noncompliance and the State Director's Decision affirming that Notice are vacated, and the case is remanded to the State Director for adjudication pursuant to 43 C.F.R. Subpart 3715.

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James P. Terry
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge